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Draft Model Law on Secured Transactions

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Addendum

Contents

		Page
Chapter VI.	Rights and obligations of the parties and third-party obligors	4
Section I.	Rights and obligations of the parties to a security agreement	4
	A. General rules	4
	Article 61. Source of rights and obligations of the parties	4
	Article 62. Obligation of a person in possession to preserve an encumbered asset	4
	Article 63. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice	5
	Article 64. Rights of a secured creditor with respect to an encumbered asset	5
	B. Asset-specific rules	5
	Article 65. Representations of the grantor	5
	Article 66. Right of the grantor or the secured creditor to notify the debtor of the receivable	6
	Article 67. Right of the secured creditor to payment	6
	Article 68. Right of the secured creditor to preserve encumbered intellectual property	7

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Section II. Rights and obligations of third-party obligors 7
A. Receivables 7
Article 69. Protection of the debtor of the receivable 7
Article 70. Notification of the security right in a receivable 7
Article 71. Discharge of the debtor of the receivable by payment 8
Article 72. Defences and rights of set-off of the debtor of the receivable 9
Article 73. Agreement not to raise defences or rights of set-off 9
Article 74. Modification of the original contract 9
Article 75. Recovery of payments made by the debtor of the receivable 10
B. Negotiable instruments 10
Article 76. Rights as against the obligor under a negotiable instrument 10
C. Rights to payment of funds credited to a bank account 10
Article 77. Rights and obligations of the depositary bank 10
D. Negotiable documents and tangible assets covered by a negotiable document 11
Article 78. Rights as against the issuer of a negotiable document 11
E. Non-intermediated securities 11
Article 79. Rights as against the issuer of a non-intermediated security 11
Chapter VII. Enforcement of a security right 11
A. General rules 11
Article 80. Post-default rights 11
Article 81. Waiver of post-default rights 12
Article 82. Judicial and extrajudicial methods of exercising post-default rights 12
Article 83. Judicial or other official relief of the grantor for non-compliance by the secured creditor 13
Article 84. Grantor's right of redemption 13
Article 85. Right of higher-ranking secured creditor to take over enforcement 13
Article 86. Secured creditor's right to possession 14
Article 87. Extrajudicial repossession of encumbered assets 14
Article 88. Extrajudicial disposition of encumbered assets 14
Article 89. Advance notice of extrajudicial disposition of encumbered assets 15
Article 90. Distribution of proceeds of disposition of encumbered assets 15
Article 91. Acquisition of encumbered assets in satisfaction of the secured obligation 16
Article 92. Rights acquired through judicial disposition of encumbered assets 17

V.15-08866

Article 93. Rights acquired through extrajudicial disposition of encumbered assets 17

B. Asset-specific rules 18

Article 94. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security 18

Chapter VI. Rights and obligations of the parties and third-party obligors

Section I. Rights and obligations of the parties to a security agreement

A. General rules

Article 61. Source of rights and obligations of the parties

Subject to the provisions of this Law, the mutual rights and obligations of the parties to a security agreement are determined by:

(a) The terms and conditions set forth in the security agreement, including any rules or general conditions referred to therein; and

(b) Any usage to which the parties to the security agreement have agreed and any practices they have established between themselves.

[*Note to the Working Group: The Working Group may wish to note that this article: (a) is based on article 11 of the* United Nations Assignment Convention *(which in turn is based on article 9 of the* United Nations Convention on Contracts for the International Sale of Goods *(CISG)) and recommendation 110 of the* Secured Transactions Guide*; (b) is intended to reiterate the principle that the parties to the security agreement may structure their agreement in any way they wish to meet their particular needs (as is done in articles 6 and 11 of the* United Nations Assignment Convention*, but not in articles 6 and 9 of the* CISG*); and (c) is intended to give legislative strength to trade usages agreed upon by the parties and trade practices established between them. The Working Group may also wish to note the Guide to Enactment will explain that the principle that a person challenging the effectiveness of the agreement on the ground that is inconsistent with the provisions of this article has the burden of proof.*]

Article 62. Obligation of a person in possession to preserve an encumbered asset

A [party to a security agreement] [secured creditor] in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.

[*Note to the Working Group: The Working Group may wish to consider whether the secured creditor only or also the grantor should be obliged to preserve the encumbered asset, depending on whether the secured creditor or the grantor has possession. In any case, this article should not result in preventing the grantor from selling the asset or in making it possible for the grantor to avoid this duty by relinquishing possession. Similarly, how this article would apply would depend on the particular circumstances. For example, if the cost of preserving the encumbered asset exceeds its value, the secured creditor would normally not only relinquish possession but take other steps to address the lack of security. These matters could be addressed in the Guide to Enactment. The Working Group may also wish to consider how the obligation of the secured creditor to take reasonable steps to preserve the encumbered asset would apply in the case of intangible assets. In that connection, the Working Group may wish to consider whether imposing such an obligation on a secured creditor where the encumbered assets are*

non-intermediated securities runs counter to the right of use of the secured creditor under article 5(1) of the Financial Collateral Directive (same issue in article 63 below).]

Article 63. Obligation of a secured creditor to return an encumbered asset or to register a cancellation notice

If the secured obligation has been fully performed and there is no further commitment by the secured creditor to extend credit secured by the encumbered assets, subject to any rights of subrogation in favour of the person performing the secured obligation, the security right is extinguished and the secured creditor must return an encumbered asset in its possession to the grantor, or register a cancellation notice as provided in article 39, paragraph 1.

[*Note to the Working Group: The Working Group may wish to consider whether this article or the Guide to Enactment should address the obligation of an assignee to withdraw the notification to the debtor of the receivable. The Working Group may wish to consider whether a new article should be added allowing a secured creditor to return equivalent non-intermediated securities to replace the originally encumbered non-intermediated securities (see art. 5(2) of the Financial Collateral Directive).*]

Article 64. Rights of a secured creditor with respect to an encumbered asset

1. A secured creditor in possession of an encumbered asset has the right:

(a) To be reimbursed for reasonable expenses incurred for the preservation of the asset in accordance with article 62;

(b) To make reasonable use of the asset; and

(c) To apply the monetary proceeds of the asset to the payment of the secured obligation.

2. A secured creditor has the right to inspect an encumbered asset in the possession of the grantor [at all reasonable times] [in a reasonable manner].

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed text in paragraph 2 of this article should be deleted as the obligation of the parties to exercise their rights and perform their obligations in good faith and in a commercially reasonable manner is already addressed in article 5 dealing with the general standard of conduct (A/CN.9/WG.VI/WP.63).*]

B. Asset-specific rules

Article 65. Representations of the grantor

1. The grantor represents at the time of conclusion of the security agreement that:

(a) The grantor has the right [or the power] to create a security right in the receivable;

(b) The grantor has not previously created a security right in the receivable in favour of another secured creditor; and

(c) The debtor of the receivable does not and will not have any defences or rights of set-off.

2. The grantor does not represent that the debtor of the receivable has, or will have, the ability to pay.

[*Note to the Working Group: The Working Group may wish to note that the reference to contrary agreement of the parties in the chapeau of paragraph 1 and in paragraph 2 (and articles 66 and 67 below) has been deleted, as this article is not among those mandatory law provisions set out in article 4, paragraph 1 (A/CN.9/WG.VI/WP.63). The Working Group may also wish to consider whether the bracketed text in subparagraph 1 (a) should be retained as, in the case where a security right is created in a receivable in breach of a contractual limitation, formally speaking, the grantor would not have the "right" but only the "power" to create a security right.*]

Article 66. Right of the grantor or the secured creditor to notify the debtor of the receivable

1. The grantor or the secured creditor or both may send the debtor of the receivable notification of the security right and a payment instruction, but after notification of the security right has been sent only the secured creditor [and received by the debtor of the receivable] may send a payment instruction.

2. Notification of a security right or of a payment instruction sent in breach of an agreement referred to in paragraph 1 is not ineffective for the purposes of article 72, but nothing in this article affects any obligation or liability of the party in breach for any damages arising as a result of the breach.

[*Note to the Working Group: The Working Group may wish to consider the bracketed wording in paragraph 1 of this article, which deals with the question whether the notification should be only sent by the secured creditor or also received by the debtor of the receivable (this issue arises also in articles 67 and 72 below).*]

Article 67. Right of the secured creditor to payment

1. As between the grantor and the secured creditor, whether or not notification of the security right has been sent, the secured creditor is entitled:

(a) To retain the proceeds of any payment made to the secured creditor and tangible assets returned to the secured creditor in respect of the encumbered receivable;

(b) To the proceeds of any payment made to the grantor and also to any tangible assets returned to the grantor in respect of the encumbered receivable; and

(c) To the proceeds of any payment made to another person and tangible assets returned to such person in respect of the encumbered receivable, if the right of the secured creditor has priority over the right of that person.

2. The rights of the secured creditor in accordance with paragraph 1 are limited to the value of the secured obligation.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 65-67 are based on*

recommendations 114-116 of the Secured Transactions Guide, *which in turn are based articles 12-14 of the* United Nations Assignment Convention. *The changes made are intended to clarify without changing the substance of these articles.*]

Article 68. Right of the secured creditor to preserve the encumbered intellectual property

An agreement between the grantor and the secured creditor that the secured creditor is entitled to take steps to preserve encumbered intellectual property is effective.

[*Note to the Working Group: The Working Group may wish to consider that, while articles 4 (party autonomy) and 62 (obligation to preserve an encumbered asset), may be generally sufficient to ensure that the secured creditor may take steps necessary to preserve encumbered intellectual property, this article is necessary as these rights are normally rights of the intellectual property owner (e.g. to renew a patent registration or pursue infringers).*]

Section II. Rights and obligations of third-party obligors

A. Receivables

Article 69. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, the creation of a security right in a receivable does not affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the contract giving rise to the receivable, without its consent.

2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:

(a) The currency of payment specified in the original contract; or

(b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

Article 70. Notification of a security right in a receivable

1. Notification of a security right in a receivable or a payment instruction is effective when received by the debtor of the receivable if it reasonably identifies the encumbered receivable and the secured creditor and is in a language that is reasonably expected to inform the debtor of the receivable about its contents.

2. It is sufficient if a notification of the security right or a payment instruction is in the language of the contract giving rise to the receivable.

3. Notification of a security right in a receivable or a payment instruction may relate to receivables arising after notification.

4. Notification of a subsequent security right in a receivable constitutes notification of all prior security rights.

Article 71. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of a security right in a receivable, it is discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of a security right in a receivable, subject to paragraphs 3-8, it is discharged only by paying the secured creditor or, if otherwise instructed in the notification or subsequently by the secured creditor in a writing received by the debtor of the receivable, in accordance with the payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single security right of the same receivable created by the same grantor, it is discharged by paying in accordance with the last payment instruction received from the secured creditor before payment.

4. If the debtor of the receivable receives notification of more than one security right in the same receivable created by the same grantor, it is discharged by paying in accordance with the first notification received.

5. If the debtor of the receivable receives notification of one or more subsequent security rights in the same receivable, it is discharged by paying in accordance with the notification of the last of such subsequent security rights.

6. If the debtor of the receivable receives notification of the security right in a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.

7. If the debtor of the receivable receives a notification as provided in paragraph 6 and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

8. If the debtor of the receivable receives notification of a security right in a receivable from a subsequent secured creditor, it is entitled to request the secured creditor to provide within a reasonable period of time adequate proof that the security right created by the initial grantor to the initial secured creditor and any intermediate security right have been created and, unless the secured creditor does so, the debtor of the receivable is discharged by paying in accordance with this article as if it had not received notification of the security right.

9. Adequate proof of a security right referred to in paragraph 8 includes but is not limited to any writing emanating from the grantor and indicating that a security right has been created.

10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Article 72. Defences and rights of set-off of the debtor of the receivable

1. Unless otherwise agreed in accordance with article 73, in a claim by the secured creditor against the debtor of the receivable for payment of the encumbered receivable, the debtor of the receivable may raise against the secured creditor:

(a) All defences and rights of set-off arising from the contract giving rise to the receivable, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the security right had not been created and the claim were made by the grantor; and

(b) Any other right of set-off that was available to the debtor of the receivable at the time it received notification of the security right.

2. Notwithstanding paragraph 1, the debtor of the receivable may not raise as a defence or right of set-off against the grantor breach of an agreement referred to in article 12, paragraph 2, limiting in any way the initial or subsequent grantor's right to create the security right.

Article 73. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3, the debtor of the receivable may agree with the grantor in a writing signed by the debtor of the receivable not to raise against the secured creditor the defences and rights of set-off referred to in article 72.

2. The agreement referred to in paragraph 1 may be modified only by an agreement in a writing signed by the debtor of the receivable [and its effectiveness against the secured creditor is subject to article 72, paragraph 2].

3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the secured creditor or based on the incapacity of the debtor of the receivable.

[*Note to the Working Group: The Working Group may wish to consider whether the bracketed sentence in paragraph 2 is necessary.*]

Article 74. Modification of the original contract

1. An agreement concluded before notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is effective as against the secured creditor, and the secured creditor acquires corresponding rights.

2. An agreement concluded after notification of a security right in a receivable created by a security agreement between the grantor and the debtor of the receivable that affects the secured creditor's rights is ineffective as against the secured creditor unless:

(a) The secured creditor consents to it; or

(b) The receivable is not fully earned by performance and either the modification is provided for in the contract giving rise to the receivable or, in the context of that contract, a reasonable secured creditor would consent to the modification.

3. Paragraphs 1 and 2 do not affect any right of the grantor or the secured creditor arising from breach of an agreement between them.

Article 75. Recovery of payments made by the debtor of the receivable

1. The failure of the grantor to perform the contract giving rise to a receivable does not entitle the debtor of the receivable to recover from the secured creditor a sum paid by the debtor of the receivable to the grantor or the secured creditor.

2. Paragraph 1 does not affect any rights that the debtor of the receivable may have against the grantor under other law.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will clarify that articles 69-75 of the draft Model Law are based on recommendations 117-123 of the* Secured Transactions Guide, *which in turn are based on articles 15-21 of the* United Nations Assignment Convention. *Paragraph 1 of this article is based on recommendation 123 of the* Secured Transactions Guide *and article 21 of the* United Nations Assignment Convention. *Paragraph 2 has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the grantor assignor.*]

B. Negotiable instruments

Article 76. Rights as against the obligor under a negotiable instrument

The rights of a secured creditor that has a security right in a negotiable instrument as against the person obligated on the negotiable instrument are subject to [the enacting State to specify the relevant law relating to negotiable instruments].

[*Note to the Working Group: The Working Group may wish to adopt in this article the same wording it may adopt in article 60, in paragraph 5.*]

C. Rights to payment of funds credited to a bank account

Article 77. Rights and obligations of the depositary bank

1. The creation of a security right in a right to payment of funds credited to a bank account does not affect the rights and obligations of the bank with which that bank account is maintained without its consent, nor does it obligate the depositary bank to provide any information about that bank account to third parties.

2. Any rights of set-off that the depositary bank may have under [the enacting State to specify relevant law relating to rights of set-off] are not affected by any security right that the bank may have in a right to payment of funds credited to a bank account maintained with the bank.

D. Negotiable documents and tangible assets covered by a negotiable document

Article 78. Rights as against the issuer of a negotiable document

The rights of a secured creditor that has a security right in a negotiable document as against the issuer of the document or any other person obligated on the document are subject to [the enacting State to specify the relevant law relating to negotiable documents].

E. Non-intermediated securities

Article 79. Rights as against the issuer of a non-intermediated security

The rights of a secured creditor that has a security right in non-intermediated securities as against the issuer of the securities are subject to [the enacting State to specify the relevant law relating to the obligations of the issuer of non-intermediated securities].

Chapter VII. Enforcement of a security right

A. General rules

Article 80. Post-default rights

1. After default, the grantor is entitled to exercise one or more of the following rights:

(a) Pay or otherwise perform in full the secured obligation and obtain a release from the security right of all encumbered assets;

(b) Apply to a court or other authority for relief if the secured creditor is not complying with its obligations under the provisions of this Law;

(c) Propose to the secured creditor, or reject the proposal of the secured creditor, that the secured creditor acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

(d) Exercise any other right provided in the security agreement or any other law.

2. After default, the secured creditor is entitled to exercise one or more of the following rights:

(a) Obtain possession of a tangible encumbered asset;

(b) Sell or otherwise dispose of, lease or license an encumbered asset;

[(c) In the case of a security right in all assets of a grantor, sell or otherwise dispose of the grantor's business as a going concern;]

[(d)] Propose that it acquire an encumbered asset in total or partial satisfaction of the secured obligation; and

[(e)] Exercise any other right provided in the security agreement or any other law, except to the extent it is inconsistent with the provisions of this Law.

3. The exercise of one post-default right does not prevent the exercise of another post-default right, except to the extent that the exercise of one right makes the exercise of another right impossible.

4. Subject to article 5, the exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the secured obligation, and vice versa.

[*Note to the Working Group: The Working Group may wish to note that this article is based on recommendations 139, 141, 143 and 144 of the* Secured Transactions Guide. *The Working Group may also wish to consider subparagraph 2 (c), which introduces a new right of a secured creditor with a security right in all assets of a grantor. This new provision, which appears within square brackets for the consideration of the Working Group, is intended to state explicitly what was implicit in recommendation 132 of the* Secured Transactions Guide *(the thrust of which is included in article 5 of the draft Model Law), namely that, if it is commercially reasonable (e.g. maximizes the value of the grantor's estate), a secured creditor with a security right in all assets of a business may sell the business as a going concern, rather than sell the encumbered assets one by one. The Working Group may wish to note that the Guide to Enactment will clarify that this section deals with post-default rights applicable to security rights in all types of asset, while the asset-specific section refers to additional post-default rights applicable to security rights in specific types of asset, such as receivables.*]

Article 81. Waiver of post-default rights

1. The grantor and any other person that owes payment or other performance of the secured obligation may not waive unilaterally or vary by agreement any of its rights under the provisions of this chapter before default.

2. The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions of this chapter.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article is necessary in view of article 5 dealing with party autonomy (A/CN.9/WG.VI/WP.63).*]

Article 82. Judicial and extrajudicial methods of exercising post-default rights

1. The secured creditor may exercise its post-default rights judicially or extrajudicially.

2. Judicial exercise of the secured creditor's post-default rights is subject to [the civil procedure rules to be specified by the enacting State].

3. Extrajudicial exercise of the secured creditor's post-default rights is subject to articles 5 and 87-90.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will include wording along the lines of recommendation 138 of the* Secured Transactions Guide *to emphasize the importance of expeditious judicial*

proceedings and extrajudicial proceedings for the availability and the cost of credit.]

Article 83. Judicial or other official relief of the grantor for non-compliance by the secured creditor

The debtor, the grantor or any other interested person is entitled to court relief [or other official relief to be specified by the enacting State], including [the enacting State to specify expeditious court proceedings], if the secured creditor fails to comply with its obligations when enforcing the security right judicially or extrajudicially in accordance with article 82.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that "other official relief to be specified by the enacting State" may include relief by an arbitral tribunal, chamber of commerce or notary public, if there is an agreement to that effect between the grantor and the secured creditor that is enforceable under the law of the enacting State. The Guide to Enactment: (a) will also explain that in such a case the law of the enacting State must provide protection for the rights of persons, who are not party to such an agreement, in the encumbered assets; (b) discuss types of expedited judicial proceeding; and (c) give examples of "interested persons", such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets. In particular with respect to resolution of enforcement-related disputes by arbitration, the Guide to Enactment will also make reference to the need for the law to ensure that third-party creditors are notified (e.g. before an extra-judicial sale takes place under article 88) and given an opportunity to assert their rights (e.g. their right to take over enforcement under article 85 or be paid from the proceeds of a sale according to their priority rank under this law under article 90).*]

Article 84. Grantor's right of redemption

1. The debtor, the grantor or any other interested person is entitled to redeem the encumbered asset by paying or otherwise performing the secured obligation in full, including payment of interest and the cost of enforcement.

2. This redemption right may be exercised until the asset is sold or otherwise disposed of, leased or licensed, acquired or collected by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

Article 85. Right of higher-ranking secured creditor to take over enforcement

1. Notwithstanding commencement of enforcement by another competing claimant creditor, a secured creditor whose security right has priority over that of the enforcing creditor is entitled to take over the enforcement process at any time before the asset is sold or otherwise disposed of, leased, licensed, or acquired by the secured creditor or until the conclusion of an agreement by the secured creditor for that purpose.

2. The right of the higher-ranking secured creditor to take over the enforcement process includes the right to enforce by any method available to a secured creditor under this Law.

[*Note to the Working Group: The Working Group may wish to consider whether paragraph 2 of this article may be deleted, as it seems to be stating the obvious, namely that a secured creditor taking over the enforcement process has the same post-default rights that any secured creditor has.*]

Article 86. Secured creditor's right to possession

After default, the secured creditor is entitled to possession of a tangible encumbered asset.

Article 87. Extrajudicial repossession of encumbered assets

[1.] The secured creditor is entitled to obtain possession of an encumbered asset without applying to a court or other authority if all of the following conditions are satisfied:

(a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;

(b) The secured creditor has given the grantor and any person in possession of the encumbered asset [or owing payment or other performance of the secured obligation] notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority within [a short period of time, such as 15 days, to be specified by the enacting State] days after notice is [sent] [received]; and

(c) At the time the secured creditor seeks to obtain possession of the encumbered asset, the grantor or any other person in possession of the encumbered asset does not object.

[2. The notice referred to in subparagraph 1 (b) need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.]

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (b) (the first of which is intended to ensure that notice is given to any person owing payment of the secured obligation, and the last of which is intended to raise the issue whether it is sufficient if the notice is sent or whether it is required that the notice be received) and paragraph 2 of this article (which is intended to reflect the rule in article 89, paragraph 6, according to which no notice is required if the encumbered assets are perishable goods).*]

Article 88. Extrajudicial disposition of encumbered assets

1. After default, a secured creditor is entitled to sell or otherwise dispose of, lease, or license an encumbered asset without applying to a court or other authority.

2. Subject to article 5, a secured creditor that exercises the right referred to in paragraph 1 may select the method, manner, time, place and other aspects of the sale or other disposition, lease or licence.

Article 89. Advance notice of extrajudicial disposition of encumbered assets

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or license an encumbered asset in accordance with article 88.

2. The notice referred to in paragraph 1 must be given to:

(a) The grantor and any debtor;

(b) Any person with rights in the encumbered asset that notifies in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the notice is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.

3. The notice must be given at least [a short period of time, such as 15 days, to be specified by the enacting State] before extrajudicial disposition takes place and must contain a description of the encumbered assets, a statement of the amount required to satisfy the secured obligation including interest and the cost of enforcement, a reference to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84 and a statement of the date after which the encumbered asset will be sold or otherwise disposed of, leased or licensed, the time and place of a public disposition, and the manner of the intended disposition.

4. The notice must be in a language that is reasonably expected to inform its recipients about its contents.

5. It is sufficient if the notice to the grantor is in the language of the security agreement.

6. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.

[*Note to the Working Group: The Working Group may wish to note that no text has been included in this article to reflect recommendation 150 of the* Secured Transactions Guide, *as that recommendation is aspirational and does not fit in model law but could be discussed in the commentary.*]

Article 90. Distribution of proceeds of disposition of encumbered assets

1. In the case of extrajudicial disposition of an encumbered asset:

(a) [Subject to the rights of holders of preferential claims under article 45,] the enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;

(b) Except as provided in subparagraph 1 (c), the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of its claim,

to the extent of the amount of that claim, and remit any balance remaining to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to [a competent judicial or other authority or to a public deposit fund to be specified by the enacting State] for distribution in accordance with the provisions of this Law on priority.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the civil procedure rules to be specified by the enacting State], but in accordance with the priority provisions of this Law.

3. A debtor remains liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in subparagraph 1 (a), which raises the issue of payments to preferential creditors that have to be paid ahead of secured creditors. Alternatively, the net proceeds may be defined as proceeds after the payment of any preferential claims or left to the civil procedure rules of the enacting State referred to in paragraph 2. The Working Group may wish to consider whether a new article should be added in the draft Model Law to deal with liability for damages for non-compliance with enforcement obligations (see Secured Transactions Guide, rec. 136). Such a new article could read along the following lines: 1. If a person violates its obligations under the provisions of this chapter, the person to whom the obligation is owed has a right to recover loss or damage resulting from that violation. 2. If the secured obligation arises from a transaction entered into by an individual for personal, family or household purposes, and the secured creditor violates its obligations under the provisions of this chapter, the person to whom the obligation is owed is deemed to have suffered damages not less than [the enacting State to specify a minimum amount in regulations or a method for determining a minimum amount in its law].*]

Article 91. Acquisition of encumbered assets in satisfaction of the secured obligation

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that has notified in writing the secured creditor of those rights, at least [a short period of time, such as 15 days, to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor;

(c) Any other secured creditor that registered a security right notice with respect to the encumbered asset, at least [a short period of time such as 15 days to be specified by the enacting State] before the proposal is [sent to] [received by] the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must specify the amount owed as of the date the proposal is sent, including interest and the cost of enforcement, and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset, describe the encumbered asset, refer to the right of the debtor or the grantor to redeem the encumbered asset as provided in article 84, and state the date after which the encumbered asset will be acquired by the secured creditor.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as 15 days to be specified by the enacting State] after the proposal is [sent to] [received by] the grantor.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5.

[*Note to the Working Group: The Working Group may wish to note that, a contrario, paragraph 5 of this article means that, in the case of full satisfaction of the secured obligation, affirmative consent by each addressee of the proposal is not needed; it is sufficient if each addressee does not object in a timely fashion (see* Secured Transactions Guide, *ch. VIII, para. 70). The Working Group may wish to consider this matter and whether it should be addressed in this article explicitly or only discussed in the Guide to Enactment.*]

Article 92. Rights acquired through judicial disposition of encumbered assets

If a secured creditor sells or otherwise disposes of, leases or licenses, an encumbered asset through a judicial [or other officially administered] process, the transferee, lessee or licensee acquires the asset [the enacting State to specify whether the transferee, lessee or licensee acquires its rights subject to or free of any rights].

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will give examples of other officially administered processes (e.g. before a chamber of commerce or notary public).*]

Article 93. Rights acquired through extrajudicial disposition of encumbered assets

1. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a court or other authority, a person that acquires the grantor's right in the asset acquires its rights free of the rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of

the security right of the enforcing secured creditor, but subject to the rights that have priority over the security right of the enforcing secured creditor.

2. If a secured creditor leases or licenses an encumbered asset without applying to a court or other authority, a lessee or licensee is entitled to the benefit of the lease or licence during its term, except as against rights that have priority over the right of the enforcing secured creditor.

3. If the secured creditor sells or otherwise disposes of, leases or licenses the encumbered asset not in accordance with the provisions of this chapter, a buyer or other transferee, lessee, or licensee of the encumbered asset acquires the rights or benefits described in paragraphs 1 and 2, provided that [it had no knowledge of a violation of the provisions of this chapter that materially prejudiced the rights of the grantor or another person and this lack of knowledge was not the result of reckless behaviour].

[*Note to the Working Group: The Working Group may wish to consider the bracketed text in paragraph 3, which is intended to implement the decision of the Working Group that the words "good faith acquirer, lessee or licensee" used in a previous version of paragraph 3 of this article (based on recommendation 163 of the* Secured Transactions Guide) *should be replaced by wording that would neither require only knowledge of non-compliance with a rule on enforcement nor go as far as to require collusion between the secured creditor and the acquirer (see A/CN.9/802, para. 31).*]

B. Asset-specific rules

Article 94. Collection of payment under a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security

1. After default, a secured creditor with a security right in a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security is also entitled to collect payment from the debtor of the receivable, obligor under the negotiable instrument, depositary bank or issuer of the non-intermediated securities.

2. The secured creditor may exercise the right provided for in paragraph 1 even before default but with the agreement of the grantor.

3. A secured creditor exercising the right referred to in paragraph 1 or 2 is also entitled to enforce any personal or property right that secures or supports payment of the encumbered asset.

4. If a security right in a right to funds credited to a bank account has been made effective against third parties by registration of a notice, the secured creditor is entitled to collect or otherwise enforce its security only pursuant to a court order, unless the depositary bank agrees otherwise.

5. The right of the secured creditor to collect under paragraphs 1 to 4 is subject to articles 68-75.

[*Note to the Working Group: The Working Group may wish to note that the Guide to Enactment will explain that the asset-specific post-default rules are*

applicable to security rights in specific types of asset, while the general post-default rules apply to security rights in all types of asset. The Working Group may wish to note that the Guide to Enactment will clarify that, once inventory is converted to a receivable, a receivable is paid into a bank account, a check is issued on the basis of that account and new inventory is bought, depending on the form of the encumbered asset during the enforcement of the security right, different rules might apply to the enforcement of that security right. The Working Group may wish to consider the application of this article to checks and bills of exchange. The Working Group may also wish to consider whether the conditions set out in article 87 for the out-of-court repossession of an encumbered tangible asset should also apply to out-of-court collection of a receivable, negotiable instrument, right to payment of funds credited to a bank or non-intermediated security. In this regard, the Working Group may wish to note that, unless the conditions for the out-of-court collection of payment under such an asset are specifically regulated and the grantor's right to due process is specifically protected, the out-of-court collection may run counter to constitutional guarantees of due process.]